

STATE OF MICHIGAN
SUPREME COURT

PINE OAKS, L.L.C., a limited,
liability company,

Plaintiff/Appellant,

v

DANNY DEVRIES & JAYNE DEVRIES,

Defendants/Appellee.

Supreme Court No. 127856

Court of Appeals No. 249163

Ottawa County Circuit Court
Case No. 02-44620-CH

District Court Case No.
HU-02-2650-LT

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127856
Supp
**APPELLANT PINE OAKS SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL**

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**FILED PURSUANT TO SUPREME COURT
ORDER DATED OCTOBER 19, 2005**

ORAL ARGUMENT REQUESTED

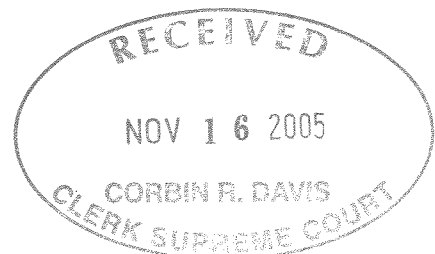


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JUDGMENT APPEALED FROM
QUESTIONS TO BE PRESENTED FOR REVIEW
STATEMENT OF MATERIAL PROCEEDINGS BELOW

These sections are set forth in the Plaintiff's Application for Leave to Appeal and are incorporated by reference.

SUPPLEMENTAL ARGUMENT

The Court Of Appeals' Decision In This Case Is Contrary To The 3 Recent Mortgage Foreclosure Cases Decided By Other Panels Of The Court Of Appeals.

This Court ordered oral argument on Plaintiff Pine Oaks' ("Pine Oaks") Application For Leave to Appeal. Its Order permitted supplemental briefs.

Since the Court of Appeals' decision in this matter, different panels of the Court of Appeals have issued three relevant decisions in mortgage foreclosure cases. While all three are unpublished, their analysis is helpful in understanding Michigan law.¹ The Court of Appeals' decision in the present case is inconsistent with these subsequent decisions, just like it is inconsistent with prior case law.

In April, the Court of Appeals issued its decision in *Ross v Charter One Mortgage*, 2005 WL 957392 (Mich.App. 2005). The Plaintiff claimed that the foreclosure proceedings in that case were invalid because the mortgagee never gave a notice of breach as required by the mortgage. The Court of Appeals upheld summary disposition for the mortgage foreclosure purchaser, ruling that the debtor may challenge the foreclosure based only on non-compliance with the statutory foreclosure procedures. Since the notice of breach was a mortgage requirement and not a statutory requirement, the Court ruled that failure to give the notice did not invalidate the foreclosure.

In reaching this conclusion, the *Ross* Court correctly described Michigan law stating that (a) the notice required by **MCL 600.3212** was posted and published and (b)

¹ Copies of the three opinions are attached. While not precedentially binding, MCR 7.215 (C) (1), unpublished opinions such as these are currently widely circulated through electronic research services and provide important insight in understanding published opinions and statutes.

the purchaser is not responsible for determining whether the mortgagee complied with contractual mortgage notice requirements.

In October, the Court of Appeals decided *Homestead Savings Bank v Norman Nealey Builders, Inc.*, 2005 WL 2757969 (Mich.App. 2005). In that case, the statutory notice of sale listed the redemption period as 6 months rather than 12 months. After the sale, the purchaser's attorney recorded an affidavit of the mistake and stated that the redemption period was actually one year. The Court ruled that this mistake over the redemption period did not void the sale because there was no harm to the defendant debtor arising from the mistake.

Earlier this month (November, 2005), the Court of Appeals decided *Jackson v Laker Group, LLC*, 2005 WL 2901787 (Mich.App. 2005). In that case, the purchaser bought the debtor's real property at a foreclosure sale for \$4,180. The debtor claimed that the foreclosure was invalid because the mortgage was not in default. The Court of Appeals ruled that the alleged defect related to the underlying mortgage, not the statutory foreclosure process. Thus, the default issue was not a defense in summary proceedings after the redemption period expired. Because the default issue was not raised before the summary eviction proceedings, it was no longer a valid defense.

The Court in *Jackson* also quoted *Ross*, stating that:

"A mistake sufficient to justify setting aside the sale *must relate to the sale itself*; otherwise, the exception would swallow the rule." 2005 WL 2901787 at p. 3. (Emphasis Supplied).

The Court then ruled that "Because Jackson did not allege circumstances relating to the foreclosure sale itself sufficient to warrant the setting aside of the sale, summary disposition was proper." 2005 WL 2901787 at p. 3.

The Court in *Jackson* also quotes from the case law relied upon by Pine Oaks stating that:

“A mortgagor is permitted to hold over after foreclosure by advertisement and challenge the validity of the foreclosure sale in the summary proceedings. Manufacturers Hanover Mortg Corp v Snell, 142 Mich.App 548, 553; 370 NW2d 401 (1985). When a mortgagor brings such a challenge to the foreclosure sale, the mortgagor is limited to the defenses that can be raised in a summary eviction proceeding. *Id.* at 553-554. ***In an eviction proceeding, a mortgagor is limited to challenging the validity of the foreclosure sale procedures***, not the other “underlying equities,” including those “bearing on the instrument.” Reid v. Rylander, 270 Mich. 263, 267; 258 NW 630 (1935). Because Jackson failed to challenge the foreclosure by advertisement before the eviction proceedings were initiated and before the lapse of the redemption period, we conclude that she is precluded from challenging the validity of the underlying mortgage.” **2005 WL 2901787 at p. 2.** (Emphasis Supplied).

These cases followed and applied prior Michigan published case law, case law that the Court of Appeals in the present case failed to follow.

The Court of Appeals misunderstood the arguments in the present case. The Court of Appeals stated that

“Plaintiff argues that Michigan case law establishes that the defense of the invalidity of foreclosure may not be raised in summary proceedings.” (Court of Appeals Opinion page 4).

This is directly opposite Pine Oaks’ argument and Michigan case law. The validity of foreclosure may be challenged in summary eviction proceedings. However, the challenge may only relate to the validity of the statutory foreclosure procedures, not matters outside of the statutory procedures.

The Court of Appeals, in the present case, ruled that the Trial Court should have allowed DeVries to go forward on several issues challenging the foreclosure. The Court of Appeals stated that “There was evidence of significant procedural irregularities with respect to the ***default, foreclosure, and redemption.***” (Court of Appeals Opinion page

6). But what were these irregularities? Were they part of the statutory foreclosure process?

First, the Court of Appeals in the present case states there were *irregularities as to default*. (Court of Appeals Opinion page 6). DeVries admitted they were in default by failing to make payments. However, DeVries argues that the mortgagee did not give the contractual notice of breach. This claim was expressly rejected in *Ross*. It is a defense outside of the statutory foreclosure proceedings and thus, this type of defense is contrary to the Court of Appeals' decision in *Jackson*. Since a notice of breach is a contractual and not a statutory requirement, failure to give the notice is not a defense allowed by *Reid v. Rylander*, 270 Mich. 263, 267; 258 NW 630 (1935) or *Manufacturers Hanover Mortg Corp v Snell*, 142 Mich.App 548, 553; 370 NW2d 401 (1985) cited in *Jackson*.

Secondly, the Court of Appeals states that there were *irregularities as to foreclosure*. On this issue, the Court of Appeals stated that:

“The foreclosure was not undertaken against defendants, the owners of the home, but instead against Poll, who had received no communications from the mortgagee in more than twenty years. Poll received no notice of default or foreclosure. According to defendants and Poll, defendants assumed Poll's mortgage. This certainly raised an issue whether there was an assumption of the mortgage, either by a formal assumption or waiver.” (Court of Appeals Opinion page 6).

The Court was obviously referring to DeVries' claim that they were not named in the notice of sale and there was evidence of an assumption. The statute at **MCL 600.3212** requires that the original mortgagor be named, not the mortgagor's assignees. Thus, the notice complied with the statute. However, DeVries admitted that they knew of the proceedings.² Thus, there was no harm. The Court of Appeals' decision in this case is directly contrary to the decisions in *Homestead* which ruled that a sale may not be

² Mr. DeVries saw the Court Officer post the notice of sale and spoke to him about the sale.

invalidated if there was no evidence harm from the mistake. The decision was contrary to *Jackson Investment Corp v. Pittsfield Products, Inc*, 162 Mich.App 750, 755; 413 NW2d 99 (1987).

Thirdly, the Court of Appeals states there were *irregularities as to redemption*. On this claim, the Court of Appeals stated that “There was evidence to support defendants’ claim that they believed the home to be redeemed following their refinancing.” (Court of Appeals Opinion page 6). There has never been a case decided on a mistaken belief of redemption. The statutory requirements mandated payment to the Register of Deeds or to the purchaser. That was not done.

Lastly, the Court of Appeals stated that:

“Absent bizarre or extraordinary circumstances, it is unlikely that an owner would sacrifice a \$120,000 home by failing to redeem it after a foreclosure sale for merely \$4,439.12, particularly here, where the home was occupied and owned by the same family for more than twenty years. Anyone bidding on this property would surmise something was amiss under these circumstances, and, consequently, plaintiff’s public policy argument fails.” (Court of Appeals Opinion page 6).

This argument is basically that a foreclosure purchaser must assume something is amiss if the mortgage balance is low. But how low is low? Is 10%, 20% or 50% so low as to put a purchaser on notice something is “amiss.”³ Further, since this has nothing to do with the statutory procedures, this type of argument was rejected by *Ross, Jackson* and *Homestead* as well as all prior reported case law.⁴ Each of these recent opinions and the prior cases required that there be something irregular about the sale process, not

³ Other than the present case, the Court of Appeals and this Court have always looked at objective facts to determine whether the foreclosure was valid or if redemption occurred in order to promote reliable real estate titles and encourage third party bidders. The Court of Appeals’ comments about DeVries’ belief about redemption and that a purchaser should know something is amiss are contrary to the objective standards used in other cases.

⁴ Cited in Pine Oaks’ Application for Leave to Appeal

merely a low mortgage balance.

In summary, DeVries claims that the foreclosure should be set aside because:

- A. There allegedly was no contractual notice of breach. This was expressly rejected by ***Ross***.
- B. The statutory notice of sale did not list DeVries' name as the mortgagor's assignee. This is not required by statute. Further, since DeVries admit that they knew of the foreclosure as soon as notice was posted, this type of claim was rejected in ***Homestead***.
- C. DeVries believed they redeemed. This belief was not induced by Pine Oaks. This type of argument was rejected in all three of the recent cases, challenges to a sale may only relate to the statutory procedures, not a mortgagor's belief.
- D. The sale price was too low. This was rejected in ***Jackson***.


These types of claims were also rejected by all of the case law cited in Pine Oaks

Application for leave to appeal.

RELIEF REQUESTED

Pine Oaks requests that this Court either (a) pre-emptorily reverse the Court of Appeals' decision or (b) grant leave to appeal from the Court of Appeals' decision and reverse it. The decisions of the District Court and Circuit Court should be re-instated.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ronald J. Vander Veen", written in dark ink.

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Dated: November 15, 2005